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In the Supreme Court of the United States

October Term, 1982

No._____

DAVID H. MOFFET, JR. and JOHN HURSTON

Petitioners,

vs.

STONE MOUNTAIN MEMORIAL ASSOCIATION, GEORGE M.D. (JOHN) HUNT, III, SUSAN W. ANTHONY, ZELL MILLER, DAVID B. POYTHRESS, W. MILTON FOLDS, JOHN W. LONG, T. STEPHEN JOHNSON, GEORGE J. WILLIS, EUGENE I. PETERSON, and "JOHN DOE",

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

(1) Where an instrumentality of a state promulgates a merit system which grants its employees job tenure, during satisfactory job performance, may the State instrumentality eliminate and revoke this property right, without complying with procedural or substantive constitutional due process?

(2) Where a written merit system agreement contains a phrase authorizing amendments, are property rights granted by the merit system subject to being "amended away" without substantive or procedural constitutional due process?

(3) Where a Court of Appeals has, by a per curiam (without written comment) opinion, effectively sanctioned the non application by a United States District Court of statutory rules of interpretation of words and phrases used in contracts, which has the effect of ignoring the usual and ordinary meaning of the word "amend",

does such call for Supreme Court power of supervision as contemplated by Rule 19?

(4) Where the United States Supreme Court in the case of Phillips Petroleum Co., et al., v. Jenkins, 56 S. Ct. 611, 297 U.S. 629, has interpreted the reservation of the right to amend to be limited and not to authorize the revocation of the principle purpose of a contract, is employment job tenure during satisfactory job performance such a principle purpose of a merit system contract as to be encompassed by the Supreme Court ruling?

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STONE MOUNTAIN MEMORIAL ASSOCIATION, GEORGE M.D. (JOHN) HUNT, III, SUSAN W. ANTHONY, ZELL MILLER, DAVID B. POYTHRESS, W. MILTON FOLDS, JOHN W. LONG, T. STEPHEN JOHNSON, GEORGE J. WILLIS, EUGENE I. PETERSON, and "JOHN DOE",

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH UNITED STATES COURT OF APPEALS

To the Honorable, Chief Justice and Associate Justices of the Supreme Court of the United States.

DAVID H. MOFFET, JR. and JOHN HURSTON, the Petitioners herein, pray that a Writ of Certiorari issue to review the Order and Judgment of the United States District Court for the Northern District of Georgia entered in the subject case and affirmed per curiam (without written comment) by The United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The unreported Order and Judgment of the United States District Court for the Northern District of Georgia dated April 29, 1981, is printed in Appendix hereto, page A1 through A21. The unreported per curiam (without written comment) opinion of The United States Court of Appeals for the Eleventh Circuit, dated March 16, 1982, affirming the District Court Order and Judgment, is printed in Appendix hereto, page A22. The unreported denial of Petition for Rehearing by The United States Court of Appeals for the Eleventh Circuit is dated April 21, 1982, and is printed in Appendix hereto, page A23,24.

JURISDICTION

The Judgment of the United States District Court for the Northern District of Georgia (See Appendix , page A21) was entered on the 29th day of April, 1981. A timely Petition for Appeal was filed. The United States Court of Appeals for the Eleventh Circuit on March 16, 1982 affirmed the judgment per curiam (without written comment) (See Appendix, page A22). A timely Petition for Rehearing was denied on April 21, 1982 (See Appendix, page A23,24). The jurisidiction of the United States Supreme Court is proper in this case as provided under Title 28, §1254 of the United States Code. Petitioners maintain that their constitutional rights of the due process of law and equal protection of law guaranteed the Fourteenth Amendment to the United States Constitution has been violated by Respondents under color of state authority which is actionable under Title 42, §1983 of the United States Code. Further, Petitioners maintain that the judgment of the District Court, and its affirmation by the

United States Court of Appeals for the Eleventh Circuit, per curiam (without written comment), is in conflict with a decision the United States Supreme Court rendered in the case of Phillips Petroleum Co. et al., v. Jenkins, 56 S.Ct. 611, 297 U.S. 629.

QUESTIONS PRESENTED FOR REVIEW

(1) Where an instrumentality of a state promulgates a merit system which grants its employees job tenure, during satisfactory job performance, may the State instrumentality eliminate and revoke this property right, without complying with procedural or substantive constitutional due process?

(2) Where a written merit system agreement contains a phrase authorizing amendments, are property rights granted by the merit system subject to being "amended away" without substantive or procedural constitutional due process?

(3) Where a Court of Appeals has, by a per curiam (without written comment) opinion, effectively sanctioned the non application by a United States District Court of statutory rules of interpretation of words and phrases used in contracts, which has the effect of ignoring the usual and ordinary meaning of the word "amend",

does such call for Supreme Court power of supervision as contemplated by Rule 19?

(4) Where the United States Supreme Court in the case of Phillips Petroleum Co., et al., v. Jenkins, 56 S. Ct. 611, 297 U.S. 629, has interpreted the reservation of the right to amend to be limited and not to authorize the revocation of the principle purpose of a contract, is employment job tenure during satisfactory job performance such a principle purpose of a merit system contract as to be encompassed by the Supreme Court ruling?

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioners assert that the following are involved in this action:

1.

Section 1, Amendment Fourteen to the Constitution of the United States of America.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprieve any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2.

United States Code Title 42, §1983, Civil Action for Deprivation of Rights.

> "Every person, who under the color of any statute, ordinance, regulation, custom, or usage of any State or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United

States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceedings for redress."

3.

United States Code Title 28, §1343, Civil Rights and Elective Franchise:

"The District Courts shall have original jurisdiction of any civil actions authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunities secured by the Constitution of the United States or any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

4.

United States Code Title 28, §1254, Courts of Appeal; Certiorari; Appeal; Certified Questions.

"Cases in the Courts of Appeal may be reviewed by the Supreme Court by the following methods:

(1) By Writ of Certiorari granted upon the Petition of any party to any civil or criminal case, before or after rendention of judgment or decree;"

5.

Code of the State of Georgia §20-704 Rules of Interpretation Sections (2) and (5):

"2. Words generally bear their usual and common signification; but technical words, or words of art, are used in a particular trade or business will be construed generally, to be used in reference to this particular meaning. The local usage or understanding of a word may be proved in order to arrive at the meaning intended by the parties."

"5. If the construction is doubtful, that which goes more strongly against the party executing the instrument, or undertaking the obligation, is generally to be preferred."

STATEMENT OF THE CASE

The STONE MOUNTAIN MEMORIAL ASSOCIATION was created by acts of the Georgia General Assembly, 1958, Page 61., to operate the STONE MOUNTAIN

MEMORIAL PARK in DeKalb County, Ga. (See Stipulation ,Appendix, page A2). At the time of its creation, it had no "merit system" and its employees were not included in the State of Georgia merit system. Petitioner JOHN HURSTON was employed on January 1, 1965, prior to the establishment of a "merit system" for the employees. Subsequently, during the year of 1966, the General Manager of the STONE MOUNTAIN MEMORIAL PARK notified JOHN HURSTON that STONE MOUNTAIN had adopted a "merit system", effective September 1, 1966 which covered HURSTON and the other employees (Plaintiff's Trial Exhibit No. 1). The "merit system" was contained in the "Personal Policies and Procedures" which were adopted at that time. The Personnel Policies and Procedures included a phrase as follows: "these policies and procedures may be amended by Association resolution." (See Stipulation, Appendix,page A2)

Petitioner DAVID H. MOFFET, JR. was employed on November 8, 1976. At that time the "merit

system" was already in existence and provided, inter alia, as follows:

"6.0 EMPLOYMENT

6.2 Probationary Period: All new employees will be hired for a probationary period of 90 days, during which time he may be separated by the department head, subject to the approval of the General Manager, without cause. Further, at the completion of 90 days' employment, all employees will be given an evaluation by the immediate supervisor. All evaluations will be treated as confidential and will be retained by the Personnel Manager. (See Paragraph 8.0 below.)

6.3 Status: All personnel will be classified in one of three categories. Full-time Permanent; Part-time Permanent; and Part-time . Following is an explanation of each status:

a. Full-time Permanent is an employee who normally works a regular scheduled work week of 40 hours or more, year around or a minimum of 1960 hours per year.

b. Part-time Permanent is an employee who normally works a scheduled work week of 28 hours or more, but less than 40 hours year around or a minimum of 1,440 hours per year.

c. Part - time is an employee, hired on a temporary status who works seasonably or does not normally work a scheduled work week of 28 hours or more year around. Part-time employees are not allowed any fringe benefits. (They are, however, covered by Workmen's Compensation).

13.0 SEPARATION

13.1 General: Unless otherwise provided in this policy, the tenure of a permanent employee shall be during good behavior and satisfactory performance of duties as recorded by his performance evaluations.

13.5 Dismissals; The supervisor or department head, upon notice to an employee stating specific reasons therefor, may dismiss any employee for cause as herein defined. For purpose (sic) of this section, 'cause' for dismissal shall be negligence or inefficiency in performing the duties of the position held, unfitness to perform assigned duties, misconduct, failure to cooperate or insubordination. Such employee may appeal to the General Manager within Ten days after the effective date of dismissal and if the General Manager exonerates such employee from the charges on which his dismissal is based, such employee may be reinstated to the position from which he was dismissed. Provided, however, any em-

> ployee convicted by a court of record of any crime involving moral turpitude when such conviction is final shall have no course to appeal." (See Stipulation, Appendix, page A3 through A5).

In July of 1978 an employee by the name of Barbara Hamilton was discharged , she challenged her discharge, hired an attorney demanded a hearing and was reinstated. (Trial testimony Transcript). This event prompted the STONE MOUNTAIN MEMORIAL ASSOCIATION through its managers and members (Trial Transcript) to revoke and repeal the heart and substance of the merit system in September of 1978 by taking from the employees their job tenure, their right to be appraised of reasons for discharge and their right to a hearing. In lieu of these rights it substituted provisions providing that all employees serve at the discretion of the General Manager. (See Stipulations Appendix, page A6). The revised provisions states as follows:

> "5.3 Status: All personnel will be classified in one of three categories: Full-time; Part-time; and

Temporary. Following is an explanation of each status:

a. Full-time is an employee who normally works a regular scheduled work week of 40 hours or more, year around or a minimum of 1960 hours per year.

b. Part-time is an employee who normally works a scheduled work week of 28 hours or more, but less than 40 hours when averaged over a one year period with a minimum of 1,440 hours per year.

c. Temporary is an employee, hired on a temporary basis who works seasonally or does not normally work a scheduled work week of 28 hours or more year around. Temporary employees are not allowed any fringe benefits.

13.0 SEPARATION AND ADVERSE ACTIONS.

13.1 General: All employees serve at the discretion of the General Manager or his designee.

13.3 Adverse Actions: The supervisor or department head, may dismiss, demote, suspend, reduce the salary of or otherwise discipline any employee under his supervision. Upon written request within ten days of the effective date of the

> adverse action, the employee may meet the General Manager or his designee regarding the adverse action."

Approximately one year later, Petitioners MOFFET and HURSTON were discharged, without cause, and denied a hearing when requested. (See Stipulation, Appendix,page A8) STONE MOUNTAIN MEMORIAL ASSOCIATION maintained that because the original "merit system" contained a phrase authorizing amendments, that any rights under the "merit system" as contained in the Personnel Policies and Procedures were subject to being revoked and repealed by amendment without due process of law. The precise language of the Personnel Policies and Procedures relied upon by STONE MOUNTAIN MEMORIAL ASSOCIATION in this regard is as follows: "these policies and procedures may be amended by Association resolution". (See Stipulation, Appendix, page A2).

At the time of discharge all Employee Performance Evaluations of DAVID H. MOFFET, JR. and JOHN HURSTON were satisfactory or better. (See

Stipulation, Appendix, page A10)

After being discharged, Petitioners MOFFET and HURSTON requested a hearing. The request was denied (See Stipulation, Appendix, page A8).

Prior to the repeal and revocation of the job security rights of Petitioners and after the Barbara Hamilton incident, George Willis, a Defendant and the General Manager of the park testified that he wanted the tenure provisions deleted and did not wish to be bothered with hearings and appeals (Trial Transcript).

REASONS FOR GRANTING WRIT OF CERTIORARI

Public employees are entitled to due process in connection with the termination of their employment where they have a liberty or property interest in their employment. Board of Regents v. Roth , 408 U.S. 564, 569 (1972). "To have a property interest and a benefit, a person clearly must have more than a unilateral expectation of it. He must, instead have a legitimate claim of entitlement to it." Id. at 577. "Property int-

erests, of course, are not created by the Constitution. Rather, they are created and their demensions are defined by existing rules or understandings that stem from an independent source such as State law -- rules or understandings that secure certain benefits and that support claims of entitlements to those benefits." Id. at 577.

Property right interests are determined by consulting State law but once determined are then subject to the protection and guarantees of the United States Constitution.

There has been no prior adjudication as to whether a property right interest was created by the "merit system" as adopted by the STONE MOUNTAIN MEMORIAL ASSOCIATION, however, a review of cases decided by Georgia Courts involving other merit and civil service systems are analogous. These cases establish the principle that where one has an expectation of continued employment during the satisfactory performance of his job duties (which is granted in this case by a specific

written document the "merit system"), such amounts to a property right interest. See Dean v. DeKalb Merit Council, 110 Ga. App. 244, 138 S.E. 2d 183 (1965), City of East Point v. Grayson, 109 Ga. App. 413, 136 S.E. 2d, 434; Scott v. Undercofler, 108 Ga. App. 460, 133 S.E. 2d 444.

In case of Thomas Harrison v. Housing Authority of the City of College Park, et al., 445 F Supp. 356, the Court held on February 6, 1978 as follows:

> "1. The first issue before the Court is whether Plaintiff had a sufficient property interest in his continued employment to entitle him to the applicable due process rights of notice and a hearing concerning his termination. 'A persons' interest in a benefit is a property interest for due process procedures if there are...RULES OR MUTUALLY EXPLICIT UNDERSTANDINGS that support his claim of entitlement to the benefit and that he may evoke a hearing. 'Perry v. Sindermann, 408 U.S. 593, 601, 92 S. Ct. 2694, 2699, 33 L. Ed. 2d 570 (1972). A property interest is created and defined by source independent of the Constitution. Such sources include State laws, ordinance or an implied contract which secures

> benefits and supports claims of entitlement to those benefits. Bishop v. Wood, 426 U.S. 341, 344, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976); Board of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)." (Capitalization added for emphasis)

Additionally, the Georgia Supreme Court in the case of the Brownlee et al. v. Harold E. Williams, 233 Ga. 548, 212 S.E. 2d 359 (1) (1975) held that employees covered by the Fulton County Civil Service System have a property interest in their continued employment. This is the same civil service system as was involved in the case of Fulton County v. Spratlin, 210 Ga. 447 (1954), twnenty-one years earlier. The earlier case, Respondents asserted, authorized revocation of property rights without due process. However, it held a persons "status" may be changed not that a property right may be revoked without due process.

Thus, the STONE MOUNTAIN MEMORIAL ASSOCIATION's execution and promulgation of the "merit system" (which granted tenure to employees during

the satisfactory performance of their job subject to dismissal for cause) granted to them a property right interest as defined by Georgia Law. Once established a property right interest is protected by the Fifth and Fourteenth Amendments of the United States Constitution and may not arbitrarily or capriciously be revoked, repealed or taken away without due process. Board of Regents v. Roth , supra.

The Trial Court in its Order and judgment, which was affirmed per curiam (without written comment) by the Eleventh United States Court of Appeals, stated (See Appendix, page A14) as follows:

> "The Court is convinced that the key issue in this case is whether the STONE MOUNTAIN MEMORIAL ASSOCIATION had the legal right to alter its Personnel Policies and Procedures to change the tenure of permanent employees from during 'good behavior and satisfactory performance' as shown by their written evaluations to serving 'at the discretion of the General Manager.'"

In determining whether the STONE MOUNTAIN MEMORIAL ASSOCIATION had the legal right to alter its Personnel Policies and Procedures the trial court in its Order and judgment stated (See Appendix,page A15,16) as follows:

> "The heart of this issue lies in the meaning to be attached to the word 'amended'. ...Thus, if the term 'amended' is given a narrow scope and if its meaning is restricted to some level of change less than the association's action in September of 1978, Plaintiff may indeed have had property rights in employment that they could not have been deprived of absent due process. If, on the other hand, 'amended' is broad enough to include the association's revision in September of 1978 of the personnel policies, the association retained a 'string' when it instituted a merit system that was paramount to the employees' rights. Instead any rights they had were contingent on the association's not 'amending' them away."

Because the Judgment centered on the word "amend", the meaning and limitation of this word must be determined. The Supreme Court of the United States in the case of Phillips Petroleum

Co., et al., v. Jenkins, 56 S.Ct. 611, 297 U.S. 629, defined the power to amend and its limitations as follows:

> "[2-4] The reservation of a power to amend is a part of a contract between the state and the corporation, and therefore Section 10 of Article I of the Federal Constitution does not apply. The reserved power is not unlimited and cannot be exerted to defeat the purpose for which the corporate powers were granted, or to take property without compensation or arbitrarily to make alterations that are inconsistent with the scope and object of the charter (635) or to destroy or impair in vested property right. On the other hand, it extends to any alteration or amendment 'which will not defeat or substantially impair the object of the grant, or any right vested under the grant, and which the legislature may deem necessary to carry into effect the purpose of the grant, or to protect the rights of the public or of the corporation, its stockholders or creditors, or to promote the due administration of its affairs.'[6]"
>
> (Footnote No. 6 cited the case of Looker v. Maynard, 179 U.S. 46, 52, 21 S.Ct. 21, 45 L. Ed. 79). (Underlining added for emphasis).

The case of Phillips Petroleum Co., et al., v. Jenkins, supra, has never been reversed and is

controlling on the lower courts as to the interpretation of the word "amend" or "amendment". This case however, does not sit in a vacuum for inferior courts throughout the nation have interpreted the word "amend" in a similar fashion to that adopted by the Supreme Court of the United States.

While there are no Georgia cases directly interpreting the word amend there are two cases which have bearing; either on the word "amend" or the reservation in a contract of such a power.

First, in the case of Eminent Household of Columbian Woodman v. Epps, 24 Ga. App. 762, 102 S.E. 174, the Georgia Court of Appeals held that a fraternal organization which provided insurance coverage could not defeat or abridge the purpose and substantial contractual rights provided by later changing the coverage of insurance. This was held even though there was an expressed statement in the original certificate issued (and which was accepted by the insured) that the

coverage was subject to the law of the fraternal order at the time of contracting or which might thereafter be enacted. In that case the Georgia Court of Appeals held that such a reservation could not be used to "reputiate the main and essential elements of the insurance contemplated in the contract." In the present action STONE MOUNTAIN MEMORIAL ASSOCIATION is asserting the reservation of the right to amend allowed it to repudiate the main and essential elements of the merit system contract which was the right of employees to continued employment during the satisfactory performance of their job duties.

Perhaps the nearest the Georgia Courts have come in case law to providing an interpretation of the word "amend"appears in the case of Ranger Insurance Company v. Columbus Muscogee Aviation, Inc., 30 Ga. App. 742, 240 S.E. 2d 474 in which the court stated as follows:

> "The insured asserts that the use of the words 'amended to read as follows' constitutes an erasure of both of these basic requirements or

> at least creates an ambiguity which should be construed adversly to the insurer. We disagree. Black's Law Dictionary (Fourth Ed.) gives three meanings for the word 'amend': 'To improve. To change for the better by removing defects or faults. To change, correct, revise.' None of these meanings can be stretched to hold that there was an erasure or deletion in the instant policy of the two basic requirements."

The action of the STONE MOUNTAIN MEMORIAL ASSOCIATION in revoking and repealing the heart and substance of the merit system, was an erasure or deletion of the basic elements of the merit system; and thus did not amount to an amendment but amounted to a revocation or repeal prohibited by the aforesaid case law.

Georgia Code §20-704 provides codified rules for interpretaion of contracts in Georgia. Under Subsection (2) it mandates that words in contracts should be given their usual and common meaning. For the lower courts to refuse to give the ususal and common meaning to the word amend but instead to adopt a "broad meaning" so as to defeat the

basic purpose of the merit system denies to Petitioners equal protection and equal application of the law as is guaranteed by Section I of the Fourteenth Amendment of the United States Constitution.

The usual and common definition of the word "amend" as found in Black's Law Dictionary Revised Fourth Edition is as follows:

> "Amend. To improve. To change for the better by removing faults. Cross v. Nee, D.C. Mo, 18 F. Supp., 589, 594. To change, correct, revise. Texas Co. v. Ford, 168 Tenn. 679, 80 S.W. 2d, 658, 660."

> Black's Law Dictionary also defines "amendment" as follows:

> "A change ordinarily for the better. Musher v. Terera, 162 M.d. 44, 158A, 14, 15. An amelioration of the same without involving the idea of any change in the substance of the essence. VanDusen v. Ruth 343 Mo.. 1096, 125 S.W. 2d 1, 3."

Doubleday's Thesaurus In Dictionary Form, published by Doubleday & Company, Inc., Garden City, New York, copyrighted 1977, gives the following meaning to the word "amend":

> "Improve, correct, better, ameliorate, amend, remedy, strengthen, restore, redeem, revive, doctor, rectify, reform."

Doubleday gives the antonyms of the word "amend" as follows:

> "Worsen, weaken, dilute, debase."

Webster's Seventh New Collegiate Dictionary defines the word "amend" as follows:

> "1: To put right; specif; to make emendations in. 2a: To change or modify for the better; improve. b: to alter esp. in phraseology; specif; to alter formally by modification, deltion or addition synonymn see correct."

The Courts of various states throughout the United States have had a occasion to define the limits of the word "amend". In the case of Greenville Community Corp. v. Alexander Smith, 95 S.E. 2d 262, 265, (1956), the word "amendment" was defined in Headnote 3. as follows:

> "The term 'amendment' by very definition connotes alteration, improvement or correction, and thus negates the idea of destruction or elimination of the original."

The word "amend" was defined in the case of Couch v. Southern Methodist University, Tex. 290 S.W. 256, 260, and in that case the Court stated as follows:

> "[6] The phrase 'to amend' is not synonomous with the phrase 'to abrogate or destroy'. Its snyonyms are 'to improve'; 'to reform'. In ordinary usage, the meaning of the word given by lexicographers is: 'The act of freeing from fault; the act of making better, or of changing for the better; correction, improvement.' Sixth Century Dictionary."

The permanent edition of Words and Phrases, Volume 3, published by West Publishing Company gives numerous cases in which the term "amendment" has been interpreted, several of which are applicable in this instance and are quoted as follows:

> "The word 'amendment' of a Statute is an alteration or change, and an amendment keeps alive while a 'repeal' destroys. State ex Rel Strutz v. Baker, 299 N.W. 574, 578, 71 N.D. 153."

> "Amendment' of a statute implies its survival and not destruction. City of Ensley v. Simpson, 52 So. 61, 63, 166 Ala. 366; Robinson v. City of Ensley, Ala. 52 So. 69."

> "The term 'amendment' implies such an additon or change within the lines of the original instrument as will effect an improvement or better carry out the purpose for which it was framed. State ex Rel Foster v. Evatt, 56 N.E. 2d 256, 282, 144 Ohio St. 65."

The Trial Court erred in failing to follow the Georgia Code 20-704 (2) and (5) which Petitioners assert, mandates that the usual and common meaning of words be applied as they are used in contracts and if an ambiguity exist it should have been resolved in Petitioners' favor.

A limitation on the right to amend was established by the United States Supreme Court in the case of Phillips Petroleum Co., et al., v. Jenkins, supra. The Trial Court, and the Eleventh United States Circuit Court of Appeals by its affirmation of the Trial Court rule in per curiam, erred by failing apply the limits of the word amend as determined by the United States Supreme Court.

It should be pointed out that the Respondents did not attempt to define "amend" in any of its arguments but it did not adopt the interpretation of the word "amend" as was stated by Petitioners in their briefs before the Court. However, the Respondents did contend that the reservation of the right to "amend" authorized the revoking of the tenure and employment rights granted by the merit system.

Respondents also argued that under Georgia law (Spratlin v. Fulton County, supra), a property right interest, such as existing under the merit system, is subject to being revoked by the appointing authority even without a reservation of the right to do so and without due process of law. Such argument ignores the fact that a property right interest may be defined by State Law but, once established, is protected by Section I, of the Fourteenth Amendment to the United States Constitution. Georgia law may not defeat a

person's Constitutional rights. The case which Respondents STONE MOUNTAIN MEMORIAL ASSOCIATION relied upon in support of their contention that a property right interest once conveyed under a merit system may be revoked without due process of law was Spratlin v. Fulton County, supra. That case was misapplied. It did not hold that a property right interest may be revoked without due process but merely that one's "status"under the law may be changed by later legislation. It is interesting to note that the very same merit system or civil service act involved in that particular case was twenty-one years later, in the case of Brownlee et al. v. Harold E. Williams, 233 Ga. 548, 212 S.E. 2d 359 (1)(1975), held have conveyed a property right interest to employees in their expectation of continued employment.

The Trial Court Judge determined that this entire case hinged on the interpretation of the word "amend" and indicated there was some question of its meaning. Under such circumstances, if it

were determined that the meaning of the word "amend' or"amendment" as appeared in a original merit system was ambiguous, Georgia Code, on interpretation of contracts, §20-704(5) mandates that the interpretation most favorable to Petitioners MOFFET and HURSTON must be applied in that it was the STONE MOUNTAIN MEMORIAL ASSOCIATION who undertook the obligation of providing tenure and job security and who executed and established the written merit system for its employees. Ga. Code 20-705 (5) states:

> "5. If the construction is doubtful, that which goes more strongly against the party executing the instrument, or undertaking the obligation, is generally to be preferred."

The Trial Court also in its judgment made the erroneous statement "the testimony by association members at trial supports the Court's conclusion that the association intended to reserve the power to change the personnel policies as it did in 1978, ...". Such a statement is totally un-

supported by the trial record. There was no testimony by any person who was an association member in 1966 when the merit system of Personnel Policies and Procedures were adopted. The association members who testified were not members at that time and did not testify about the intention of the association in 1966 at the time it enacted the merit system agreement with its employees. Some of the members did tesfity that when they, in September of 1978, revoked the rights of employees to continued employment during the satisfactory performance of their job duties, they intended to do just that and to make employment subject to the will of the General Manager, but even these people did not testify what the original association members intended at the time they adopted the merit system. Thus there is absolutely no evidence to support the Court's conclusion that the association intended at the time it adopted the merit system, to reserve the power to change the personnel policies as it did.

CONCLUSION

Certiorari should be granted because the judgment of the trial court, affirmed per curiam (without written comment) by the Eleventh United States Circuit Court of Appeals, is in conflict with the decision of the United States Supreme Court Phillips Petroleum Co. et al., v. Jenkins, supra, which defines the limits applicable to a reservation of the right to amend. A Writ of Certiorari should issue in order that the Supreme Court can review the lower courts' actions and non-application of limits to be applied to Amendments.

Further, the broad interpretation of the word "amend" as applied by the Trial Court Judge was not authorized by Georgia Law in that Georgia Code §20-704 defines how contracts are to be interpreted. This code section was not followed by the Trial Court Judge nor was it applied by the United States Circuit Court of Appeals of the Eleventh Circuit who affirmed the Trial Court

Judge per curiam (without written comment). Because of this the Supreme Court should exercise its power of supervision as contemplated by Rule 19.

Petitioners had a property right interest in their expectation to continued employment under the Personnel Policies and Procedures "Merit System" executed and adopted by the STONE MOUNTAIN MEMORIAL ASSOCIATION. This property right interest vested and having vested is subject to the protection guaranteed by the Fourteenth Amendment of the United States Constitution. The taking away of this property right interest, without due process of law, by "amendment" does violence to Petitioners constitutional rights and the Supreme Court should assert its power to prevent the denial of Petitioners constitutional right to due process.

Additionally, equal protection of the laws, as guaranteed by Section I of the Fourteenth Amendment of the United States Constitution, was

denied Petitioners in that Petitioners established at trial that Barbara Hamilton had been given the opportunity of a hearing following discharge and this was denied to Petitioners.

Petitioners respectfully pray that a Writ of Certiorari issue and Petitioners constitutional rights be protected.

Respectfully submitted,



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Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that three copies of the above Petition for Certiorari have been served on the Honorable Michael J. Bowers, Attorney General of the State of Georgia, Respondents Counsel, by depositing same in the United States Mail, with adequate postage thereon and addressed as follows:

Michael J. Bowers, Esq.
Attorney General,
State of Georgia
132 State Judicial Building
Atlanta, Georgia 30334

Dated this 24th day of June, 1982.



FLETCHER THOMPSON
Attorney for Petitioners

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DAVID H. MOFFET, JR. and JOHN HURSTON,	:	
vs.	:	CIVIL ACTION NO. C80-153A
STONE MOUNTAIN MEMORIAL ASSOCATION; GEORGE M.D. (JOHN) HUNT, III: SUSAN W. ANTHONY; ZELL MILLER; DAVID B. POYTHRESS; W. MILTON FOLDS; JOHN W. LONG; T. STEPHEN JOHNSON; GEORGE J. WILLIS; EUGENE I. PETERSON; and "JOHN DOE"	:	

ORDER

This action, in which Plaintiffs allege that Defendants deprived them of property rights in their employment without due process of law, is before the court for resolution following trial by the court without a jury on December 12, 1980. This order shall serve as the court's findings of fact and conclusions of law, Rule 52(a), Fed. R.Civ.P.

The parties have stipulated to the following:

The Stone Mountain Memorial Association was created by the Georgia General Assembly in 1958 as a body corporate and public and an instrumentality and public corporation of the State which in its name may contract and be contracted with, sue and be sued implead and be impleaded, and complain and defend in all courts of law and equity.

Pursuant to the authority delegated to it by the Georgia General Assembly, the Stone Mountain Memorial Association, on August 22, 1966, through the adoption of personnel policies and procedures recommended by the Yarger Report, adopted a merit system ("1966 Merit System") for Stone Mountain employees to be effective September 1, 1966.

The personnel policies and procedures of the 1966 Merit System provided, inter alia, at page III-25, as follows: "These policies and procedures may be amended by Association resolution." The personnel policies and procedures have been amended and changed from time to time. As of

February 2, 1976, certain provisions of the personnel policies and procedures of the Defendant Stone Mountain Memorial Association provided, inter alia, as follows:

"6.0 EMPLOYMENT

6.2 Probationary Period: All new employees will be hired for a probationary period of 90 days, during which time he may be separated by the department head, subject to the approval of the General Manager, without cause. Further, at the completion of 90 days' employment, all employees will be given an evaluation by the immediate supervisor. All evaluations will be treated as confidential and will be retained by the Personnel Manger. (See Paragraphs 8.0 below.)

6.3 Status: All personnel will be classified in one of three categories. Full-time Permanent; Part-Time Permanent; and Part-time. Following is an explanation of each status:

a. Full-time permanent is an employee who normally works a regular scheduled work week of 40 hours or more, year around or a minimum of 1960 hours per year.

b. Part-time Permanent is an employee who normally works a scheduled work week of 28 hours or more, but less than 40 hours

year around or a minimum of 1,440 hours per year.

c. Part-time is an employee, hired on a temporary status who works seasonably or does not normally work a scheduled work week of 28 hours of more year around. Part-time employees are not allowed any fringe benefits. (They are, however, covered by Workmen's Compensation.)

13.0 SEPARATIONS

13.1 General: Unless otherwise provided in this policy, the tenure of a permanent employee shall be during good behavior and satisfactory performance of duties as recorded by his performance evaluations.

13.5 Dismissals: The supervisor or department head, upon notice to an employee stating specific reasons therefor, may dismiss any employee for cause as herein defined. For purpose [sic] of this section, 'cause' for dismissal shall be negligence or inefficiency in performing the duties of the position held, unfitness to perform assigned duties, misconduct, failure to cooperate or insubordination. Such employee may appeal to the General Manager within ten days after the effective date of dismissal and if the General Manager exonerates such employee from the charges on which

> his dismissal is based, such employee may be reinstated to the position from which he was convicted by a court of record of any crime involving moral turpitude when such conviction is final, shall have no course to appeal."

The personnel policies and procedures were further changed by resolution of the Defendants Stone Mountain Memorial Association at its September 11, 1978, meeting deleting the language as appeared in "6.2 Probationary Period" with no replacement, and changing "6.3 Status" to 5.3 Status" and also changing section 13. The changed sections provide, inter alia, as follows:

> "5.3 Status: All personnel will be classified in one of three categories: Full-time; Part-time; and Temporary. Following is an explanation of each status:
>
> a. Full-time is an employee who normally works a regular scheduled work week of 40 hours or more, year around or a minimum of 1960 hours per year.
>
> b. Part-time is an employee who normally works a scheduled work week of 28 hours or more, but less than 40 hours when averaged over a one year period with a minimum of 1,440 hours per year.

c. Temporary is an employee, hired on a temporary basis who works seasonally or does not normally work a scheduled work week of 28 hours or more year around. Temporary employees are not allowed any fringe benefits.

13.0 SEPARATION AND ADVERSE ACTIONS

13.1 General: All employees serve at the discretion of the General Manager or his designee.

13.3 Adverse Actions: The supervisor or department head, may dismiss, demote, suspend, reduce the salary of or otherwise discipline any employee under his supervision. Upon written request within ten days of the effecitve date of the adverse action, the employee may meet the General Manager or his designee regarding the adverse action."

The above-quoted sections are the language that existed from September 11, 1978 to present.

On October 19, 1979, defendant Peterson requested the resignation of Plaintiff Moffet, advising him if it was not given, Moffet's employment would be terminated. Moffet met that day with Defendant Willis, who agreed at that time to

give Moffet thirty days to correct any deficiencies as related to him. On October 23, 1979, Moffet and Hurston were fired with the only written reason given being that it was in the best interest of the Park.

On October 23, 1979, the attorney for Plaintiff Moffet by letter demanded that Moffet be reinstated to his position, and by letter to Defendant Miller, with a copy to all members of the Association, requested that Moffet be reinstated. The letter and copies were received.

On October 26, 1979, Plaintiff Hurston, through his attorney and by letter to Defendant Hunt, with a copy to all members of the Association, requested that he be reinstated and if he not be reinstated that he be granted a hearing. The letter and copies were received.

On October 25, 1979, Defendant Willis instructed Plaintiffs' attorney that all communications regarding Plaintiff Moffet be directed to Michael J. Bowers, Senior Assistant Attorney

General. On October 29, 1979, defendant Hunt, Chairman of the Stone Mountain Memorial Association, made a similar request. The Letter was received.

On October 31, 1979, by letter to Michael J. Bowers, Senior Assistant Attorney General, Fletcher Thompson, as attorney for Plaintiffs Moffet and Hurston, requested a hearing before the Stone Mountain Memorial Association for his clients. The letter was received.

The Stone Mountain Memorial Association and George M.D. (John) Hunt, III, Susan W. Anthony, Zell Miller, David B.Poythress, W. Milton Folds, John W. Long, and T. Stephen Johnson had it within their power to reinstate Plaintiffs to their jobs or to require a hearing for Plaintiffs concerning their discharge and refused to reinstate or give a hearing. Moffet and Hurston were not reinstated and have been given no hearing wherein they could answer charges. Any hearing Georgie Willis could have provided would have been before himself or subordinates.

Plaintiff Moffet attended the aforesaid September 11, 1978 meeting of the Defendant Stone Mountain Memorial Association for the purpose of giving a report, and was present during the consideration and adoption by the Association of the changed personnel policies and procedures.

Plaintiff Moffet received the Stone Mountain Memorial Association memorandum dated September 18, 1978 advising department managers of the Defendant Stone Mountain Memorial Association of the changes effective September 18, 1978 in the personnel policies and procedures.

Both Plaintiff Moffet and Plaintiff Hurston attended the February 7, 1979 meeting of supervisory employees of the Defendant Stone Mountain Memorial Association.

Prior to the termination of their employment with the Defendant Stone Mountain Memorial Association, neither Plaintiff Moffet nor Plaintiff Hurston voiced any objection to any Defendants in this action concerning the change of the personnel

policies and procedures effective September 18, 1978.

The employment of the Plaintiffs Moffet and Hurston by the Defendant Stone Mountain Memorial Association on October 23, 1979 was terminated by Defendant Peterson as the designee of the General Manager of the Association.

Defendant Willis was at all times relevant to this action the General Manager of the Stone Mountain Memorial Association, and Defendant Peterson was at all such times the Senior Assistant General Manager of the Defendant Association.

The Plaintiffs at the time of the termination of their employment received no written reason, other than as in section 8 above, stating why they were discharged and all Employee Performance Evaluations of Plaintiffs up to the time of discharge were satisfactory or better.

At the time of the termination of his employment, Plaintiff Moffet received $4,444.00 from the Defendant Stone Mountain Memorial Asso-

ciation. This amount consisted of the following: Pay earned October 13-23, 1979 - $565.60; accrued annual leave - $2,020.00; pay October 24-26, 1979 $242.40; and unearned pay--four weeks--$1,616.00

At the time of the termination of his employment, Plaintiff Hurston's salary from the Defendant Stone Mountain Memorial Association was $684.00 per two weeks. The Association was paying into Hurston's retirement fund $139.27 per month and $68.32 per month was paid by the Association for Hurston's hospital and medical benefits.

At the time of the termination of his employment, Plaintiff Hurston received $2,975.40 from the Defendant Stone Mountain Memorial Associaition. This amount consisted of the following: Pay earned October 13-23, 1979 - $478.80; accrued annual leave - $923.40; pay October 24-26, 1979 $205.20; unearned pay - four weeks-$1,368.00.

On December 19, 1979, the Defendants through their counsel furnished the Plaintiffs through their counsel detailed written reasons why Plain-

tiff Moffet were terminated; no hearing was held thereafter.

The parties stipulate to the accuracy of the following facts but not to their relevancy: If called to testify, Margaret A. House would testify under oath as follows: I am currently the custodian of the files and records of the DeKalb County Water Quality Control Laboratory and Monitoring Branch of the Water and Sewer Department. During all of 1978 and 1979 I was also the custodian of said files and records. From my review, I have determined that the only letter or written communication other than routine analytical reports on monthly samples sent to the Stone Mountain Memorial Association or any of its employees, officers, agents or representatives, from the DeKalb County Water and Sewer Department concerning wastewater samples or sewage discharge from the Association's water treatment plant is set forth in Exhbiit "A" to the parties' "Stipulation of Facts" filed October 24, 1980. More-

over, from my personal recollection, this is the only such letter or written communication.

(END OF STIPULATED FACTS)

In order for a public employee to be entitled to procedural due process in connection with termination of his employment, the employee must demonstrate that he has either a liberty or a propery interest in his employment. Board of Regents v. Roth, 408 U.S. 564, 569 (1972). Plaintiffs here seek to vindicate only their claimed property right in their employment. "To have a property interest in a benefit, a person clearly must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Id. at 577. "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and

that support claims of entitlement to those benefits." Id at 577.

The parties agree that the court must decide whether plaintiffs were possessed of a property interest in their employment by consulting Georgia Law. Neither the court nor the parties have located any Georgia authority on point, however. Defendants rely heavily upon Fulton County v. Spratlin, 210 Ga. 447 (1954), to support their position. That case only tangentially relates to the issue before the court, however. Plaintiffs, on the other hand, advance various cases from other jurisdiction on the scope of the word "amend", also minimally persuasive.

The court is convinced that they key issue in this case is whether the Stone Mountain Memorial Association had the legal right to alter its personnel policies and procedures to change the tenure of permanent employees from during "good behavior and satisfactory performance" as shown by their written evaluations to serving "at the

discretion of the Genral Manager." Plaintiffs argue that, prior to the September 11, 1978 changes in the personnel policies, they had a property interest in their employment and that they could not be deprived of those property rights either by amendment of the policies or by discharge without a hearing.

Defendants contend, however, that the personnel policies and procedures, as originally enacted, provide that "[T]hese policies and procedures may be amended by Association resolution," and that this reservation expressly provided the authority to change the personnel policies in September 1978.

The heart of this issue lies in the meaning to be attached to the word "amended". Defendants argue that the Association's actions in revising the personnel policies amounted to no more than an amendment of them that was expressly authorized within the policies. Plaintiffs contend vigorously in opposition that amendment contemplates

some change less radical than the Association's actions in September 1978, which Plaintiffs argue constituted a repeal of critical portions of the personnel policy and thus a deprivation of property rights in their employment. Thus, if the term "amended" is given a narrow scope and if its meaning is restricted to some level of change less than the Association's action in September 1978, Plaintiffs may indeed have had property rights in their employment that they could not have been deprived of absent due process. If, on the other hand, "amended" is broad enough to include the Association's revision in September 1978 of the personnel policies, the Association retained a "string" when it instituted the merit system that was paramount to the employees' rights. Instead, any rights they had were contingent on the Association not "amending" them away.

The court is particularly troubled by the prospect of adjudicating this dispute, involving as it does a matter of great importance to the

parties, on an ephemeral and hypertechnical linguistic analysis. Since, as noted above, any property interest Plaintiffs may have in their employment must exist under Georgia Law, the court has conducted careful research to locate some Georgia authority on point, but has found none. However, after thoughtful consideration and in reliance upon the general principles of the law relating to relations between masters and servants that are ingrained in the law in Georgia, the court is left with the firm conviction that the Association's reservation in its personnel policy of the power to amend those policies precluded the existence of a property interest entitled to due process protection.

A general hiring, or employment for no fixed period, creates an employment relationship that is terminable by either party. See Ga. Code Ann. §66-101. Absent a controlling contract, even "permanent employment" or "employment for life" is employment for a indefinite period, terminable

at will. E.g., Georgia Power Co. v. Busbin, 242 Ga. 612, 613 (1978). Thus, under Georgia law, a clear and unambiguous contract must exist in order to alter this status quo of employment at will.

The Association was not required to institute any merit personnel policies in 1966. The legal relations created by those personnel policies thus stem from and are limited by the language of the policies themselves, as the evidence of the Association's intention. The testimony by Association members at trial supports the court's conclusion that the Association intended to reserve the power to change the personnel policies as it did in 1978, and the language used in the policies to reserve that power was effecitve to do so. Accordingly, despite Plaintiffs' unilateral expectation that the Association conveyed upon them an employment relation that amounted to property entitled to due process protection, the Association's reservation of the power to amend the terms of the

employment relation defeated the created of any such property.

Based upon the foregoing, the court DIRECTS the clerk to enter judgment in favor of Defendants.

SO ORDERED, this 28th day of April, 1981.

/s/ Newell Edenfield
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DAVID H. MOFFET, JR. and JOHN HURSTON,	:	
Plaintiff,	:	
v.	:	CIVIL ACTION FILE C80-153A
STONE MOUNTAIN MEMORIAL ASSOCIATION, et al.,	:	
Defendants.	:	

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable NEWELL EDENFIELD, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered.

It is ordered and Adjudged that the Plaintiffs take nothing, that the action be dismissed, and that Defendants STONE MOUNTAIN MEMORIAL ASSOCIATION, GEORGE M.D. (JOHN) HUNT, III, SUSAN W. ANTHONY, ZELL MILLER, DAVID B. POYTHRESS, W. MILTON FOLDS, JOHN W. LONG, T. STEPHEN JOHNSON,

GEORGE J. WILLIS, EUGENE I. PETERSON, and "JOHN DOE" have and recover of Plaintiffs DAVID H. MOFFET, JR. and JOHN HURSTON their costs of action.

Dated at Atlanta, Georgia this 29th day of April, 1981.

Filed and entered in Clerk's office
April 29, 1981
Ben H. Carter, Clerk

by /s/ A. Burns
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7432

D.C. Docket No. C-80-153A

DO NOT PUBLISH

DAVID H. MOFFET, JR. and
JOHN HURSTON,

Plaintiffs-Appellants,

versus

STONE MOUNTAIN MEMORIAL ASSOCIATION,
et al.

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

---

(March 16, 1982)

Before TUTTLE, TJOFLAT, and CLARK, Circuit Judges

PER CURIAM: AFFIRMED. See Circuit Rule 25.

"Costs are taxed against Plaintiffs-Appellants."

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 81-7432

DAVID H. MOFFET, JR.,
and JOHN HURSTON,,

Plaintiffs-Appellants,

versus

STONE MOUNTAIN MEMORIAL
ASSOCIATION, et al.

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC.

(Opinion March 16, 1982, 11 Cir.,198_,_F..2d___).
(April 21, 1982)

Before TUTTLE, TJOFLAT and CLARK, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Cirucit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ THOMAS A. CLARK
UNITED STATES CIRCUIT JUDGE

Office - Supreme Court, U.S.
FILED
JUL 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2350

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DAVID H. MOFFET, JR. and JOHN HURSTON,
Petitioners,

v.

STONE MOUNTAIN MEMORIAL ASSOCIATION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

MICHAEL J. BOWERS
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Attorney General

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PLEASE ADDRESS ALL COMMUNICATIONS TO:

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Assistant Attorney General
132 State Judicial Bldg.
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Counsel of Record
For Respondents

I. QUESTION PRESENTED

Whether this Court should review the judgments of the Courts below following a full trial on the merits, which concluded, based on findings of fact and State law, that Petitioners had no vested property right in continuation of their employment with the Respondent Stone Mountain Memorial Association.

II. PARTIES

The Parties to this action are: Petitioners David H. Moffet, Jr. and John Hurston; Respondents Stone Mountain Memorial Association, George M. D. (John) Hunt, III (Association Chairman), Susan W. Anthony (former Association member), Georgia Lieutenant Governor Zell Miller (Association member), Georgia Secretary of State David B. Poythress (Association member), Georgia Commissioner of Industry and Trade W. Milton Folds (Association member), John W. Long (former Association member), T. Stephen Johnson (Association Vice-chairman), George J. Willis (Association General Manager), and Eugene I. Peterson (Association Senior Assistant General Manager).

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V. OPINIONS AND JUDGMENTS BELOW

Pursuant to Rule 34.2 of the rules of this Court, Respondents adopt herein the texts of the opinions and judgments delivered in the Courts below, which are as yet unreported, as they appear at the following pages of the Petition for Certiorari:

Opinion and Order of the District Court....pp. A-1-19

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Order and Judgment of the Eleventh Circuit United States Court of Appeals.....p. A-22

Order of the Eleventh Circuit United States Court of Appeals on Petition for Rehearing and Suggestion for Rehearing En Banc.....pp. A-23, 24

VI. APPLICABLE PROVISIONS OF LAW AND RULES OF COURT

Pursuant to Rule 34.2 of this Court, Respondent relies on the applicable statutes, regulations, and policies cited in the Petition for Certiorari, with the following additions:

Georgia Laws 1958, pp. 61, 66, Sec. 5(d):

> "Section 5. Powers of the Association. The Association shall have, in addition to any other powers in this Act, the following powers:
>
> * * *

(d) To appoint such additional officers, who need not be members of the association, as the association deems advisable, and to employ such experts, agents, and employees as may be, in its judgment necessary to carry on properly the business of the association; to fix the compensation for such officers, experts, agents, and employees and to promote and discharge same. . . ."

Interim Circuit Rules of the Eleventh Circuit United States Court of Appeals:

"Rule 25. Affirmance without opinion. When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision:

(a) Judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) The evidence in support of a jury verdict is not insufficient;

(c) The order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) Summary judgment, directed verdict or judgment on the pleadings is supported by the record;

and the court also determines that no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion."

NO. 81-2350

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DAVID H. MOFFET, JR. and JOHN HURSTON,

Petitioners,

v.

STONE MOUNTAIN MEMORIAL ASSOCIATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

VII. STATEMENT OF THE CASE

Petitioners Moffet and Hurston were terminated from their employment with the Respondent Stone Mountain Memorial Association [1] by the Respondent Senior Assis-

[1] The Stone Mountain Memorial Association (hereinafter on occasion referred to as "the Association") was created as a body corporate and charitable institution by Georgia Laws 1958, p. 61, *et seq.* By such legislation the Association was given the power to:

". . . employ such . . . employees as may be, in its judgment, necessary to carry on properly the business of the association; . . . and . . . to promote and *discharge* same. . . ." Ga. L. 1958, pp. 61, 66, Sec. 5(d). (See pp. iv, v, *supra*, emphasis added).

tant General Manager Peterson, acting as the designee of of the General Manager, on October 23, 1979. (Stip. 18, R-213, Petition for Certiorari, at p. A-10).[3] At the time of those terminations, the personnel Policies and Procedures of the Association provided that:

> "All employees serve at the discretion of the General Manager or his designee." (Stip. 5, R-211, Petition for Certiorari, at p. A-6).

Petitioners' complaint was filed on January 30, 1980, alleging a cause of action under 42 U.S.C. § 1983, § 1985(3), and § 1986. Count I alleged an unlawful deprivation of a property right of Petitioners in their employment with the Respondent Stone Mountain Memorial Association. This count also raised allegations of intentional denial of equal protection rights and due process rights, interference with freedom of association, and conspiracy.

Counts II, III, IV, V, and VI alleged conspiracy and going in disguise upon the highway, etc., failure to prevent the effects of a conspiracy, breach of contract, breach of an additional contract, and interference with contract rights, respectively. Each of these counts was dismissed at trial either on stipulation limiting evidence, or for lack of evidence. (R-I-10-20, I-273-274, R-4-16). (As these counts are not raised in the Petition, Petitioners have apparently abandoned the same.)

After the filing of responsive pleadings (R-31-42), the completion of discovery (R-98), and the filing of pre-trial

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[3] All Stipulations of Fact will hereinafter be cited as (Stip. ____, R-____). All other citations to the record will hereinafter appear as (R-____). (R-I-____) and R-II-____) indicate either of the two volumes of trial transcript in the record, such volumes not being numbered with regular (R-____) designations.

submissions (R-137, 160), a three-day non-jury trial was held before the late Honorable Newell Edenfield, Judge of the District Court of the Northern District of Georgia, Atlanta Division, on December 10-12, 1980. (R-2, Petition for Certiorari, at p. A-1). Post-trial briefs were filed by both parties. (R-217, 230, 283).

The evidence and stipulations at trial showed that on August 22, 1966, the Respondent Association first adopted personnel Policies and Procedures. (Stip. 2, R-209, Petition for Certiorari, at p. A-2). The last provision of these personnel Policies and Procedures provided by specific reservation that:

> "These policies and procedures *may be amended* by Association resolution." (Section 13.1, Policies and Procedures, effective August 22, 1966, Stip. 3, R-209, Petition for Certiorari, at p. A-2; emphasis added).

On February 2, 1976, the Association exercised this reserved amendment power to provide for the first time in its Policies and Procedures, *inter alia*, as follows:

> "*Unless otherwise provided* in this policy, the tenure of a permanent employee shall be during good behavior and satisfactory performance of duties as recorded by his performance evaluations." (Policies and Procedures, Section 13.1, Stip. 4, R-209, Petition for Certiorari, at p. A-4)

This 1976 amendment to the Association's Policies and Procedures also provided, in Section 13.5, for dismissal of employees by supervisors or department heads for cause upon notice stating specific reasons for dismissal, and defined the word "cause" for those purposes. Provision was made for an appeal to the General Manager, who was empowered to exonorate an employee from the

charges upon which the dismissal was based. (Stip. 4, R-210, Petition for Certiorari, at pp. A-4, 5).

The amendment power reservation was again exercised by the Association, at its September 11, 1978 meeting, to in fact provide otherwise. (Stip. 5, R-210, 211, Petition for Certiorari, at pp. 5, 6). The foregoing provisions of Section 13.1 of the 1976 Policies and Procedures were deleted at that time by amendment, and substituted in place thereof was the provision that:

> "All employees serve at the discretion of the General Manager or his designee." (Stip. 5, R-211, Petition for Certiorari, at p. A-6).

This provision remained in effect through the date of both Petitioners' dismissals on October 23, 1979. (Stips. 5 and 6, R-210, 211, Petition for Certiorari, at pp. A-6, 10).

It was stipulated that both Petitioners were aware of and acquiesced in the aforementioned amendment to the personnel Policies and Procedures, and made no comment or objection thereto. (R-I-96, 97, R-II-27, II-72; Stip. 17, R-213, 294, Petition for Certiorari, at pp. A-9, 10). On October 23, 1979, the employment of Petitioners Moffet and Hurston was terminated by Respondent Assistant General Manager Peterson, acting as the designee of the General Manager of the Stone Mountain Memorial Association. (Stip. 18, R-213, Petition for Certiorari, at p. A-10). At no time subsequent to the termination of Petitioners' employment with the Stone Mountain Memorial Association did either appeal his termination to the General Manager, nor did they request to meet with him. (R-I-56, I-93-94, I-291).

The trial Court rendered judgment in favor of the Respondents on all counts of the Complaint on April 29,

1981. (R-290-300, Petition for Certiorari, at pp. A-1-21). In that judgment, Judge Edenfield ruled *as a matter of fact and State law* that Petitioners had *no vested property rights* in their employment with the Respondent Association; in that the September 11, 1978 amendment to the personnel Policies and Procedures was clearly authorized by the pre-existing express reservation of the power to amend those policies, as incorporated in the last provision of the original personnel Policies and Procedures in 1966. (Petition for Certiorari, at pp. A-1-19). Noting that the Respondent Association was not required by law to institute *any* personnel policies in 1966, the Court construed the clear and specific reservation of the power to amend those policies as including the power to delete the provisions which had themselves been *added* by amendment *subsequent* to the reservation. (Petition for Certiorari, at p. A-18). The Court further specifically found that the Association *intended* to reserve the power to change the personnel policies in the manner it subsequently did in 1978, and concluded as a matter of law that the language used in the reservation of that power was effective to do so. (Petition for Certiorari, at p. A-18). Judge Edenfield concluded that this reservation of the power to amend therefore defeated and *prevented the creation of any vested property rights.* (Petition for Certiorari, at A-18, 19).

Petitioners appealed to the Eleventh Circuit Court of Appeals. After the filing of extensive briefs and reply briefs, and after oral argument, the Eleventh Circuit Court of Appeals, in a *per curiam* order, affirmed the District Court's order without opinion, under Rule 25 of the Eleventh Circuit. (Petition for Certiorari, at A-22). Rule 25 of the Eleventh Circuit specifies that the Court may affirm without opinion in several circumstances,

only one of which would be relevant to this case, that being:

> "(a) Judgment of the District Court *is based on findings of fact that are not clearly erroneous* . . . and the Court also determines that no error of law appears and an opinion would have no precedential value . . . ." (emphasis added) (See p. v, *supra*).

Petitioners subsequently petitioned for a rehearing and filed a suggestion for rehearing *en banc*, both of which were denied. (Petition for Certiorari, at A-23, 24).

VIII. SUMMARY OF ARGUMENT

The decisions of the Courts below deal solely with an application of State law to the facts, are confined exclusively in scope and effect to the facts of this case, involve no issue of national import, were correctly decided on their merits, and do not conflict with any decisions of this Court or other Circuit Courts of Appeal. Therefore, this case is not an appropriate one for review by this Court on certiorari.

IX. ARGUMENT, INCLUDING CITATION OF AUTHORITIES

A. There is no conflict between the decisions below and prior decisions of this Court or the Circuit Courts concerning the scope of a reserved power to "amend."

In order to claim entitlement to procedural due process with respect to loss of employment in cases such as this, the Petitioners must show they have been deprived of an interest encompassed within the Fourteenth Amendment's protection of "liberty" or "property." *Board of Regents v. Roth*, 408 U.S. 564 (1972). Continued employ-

ment by public agencies such as the Respondent Stone Mountain Memorial Association is not, without more, a liberty interest protected by the due process clause of the Fourteenth Amendment, especially when there is no showing of any restriction on Petitioners' freedom to seek a job elsewhere. *Roth, supra,* 408 U.S., at 575, citing *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895-896 (1961). Likewise, the same conclusion is applicable to the *termination* of a public employee who is terminable at will according to the conditions of his present employment, without some similar showing of restriction on his liberty to seek employment elsewhere. *Bishop v. Wood,* 426 U.S. 341, 348 (1976).

Under the rulings of this Court in *Roth, supra,* such property interests:

> ". . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as State law. . . ." 408 U.S., at 577.

More recently, in *Bishop v. Wood, supra,* the Court reiterated this principle:

> "A property interest in employment can, of course, be created by ordinance, or by an implied contract. [note omitted] *In either case, however, the sufficiency of the claim of entitlement must be decided by reference to State law.*" (citing *Roth, supra.*) (emphasis added) 426 U.S., at 344.

See also, Glenn v. Newman, 614 F.2d 467, 471 (5th Cir. 1980); *United Steelworkers of America v. University of Alabama,* 599 F.2d 56, 60 (5th Cir. 1979).

At the oral argument before the Eleventh Circuit Court of Appeals, counsel for Petitioners conceded upon questioning from the Court that Petitioners' entire case

boils down to the interpretation which the Georgia courts would place upon the scope of the Respondents' pre-existing reserved power to "amend" any of their personnel policies and procedures by subsequent Association Board action. Petitioners below, as in their Petition for Certiorari, have cited out of context only a spattering of headnotes to decisions which, in certain specific circumstances, have restrictively interpreted the scope of the word "amend." For every such restrictive interpretation, there are numerous broader interpretations which include in the various forms of a reserved power to "amend," the power to *delete* as well as *add* provisions to a policy or statute. *See, e.g., Christian Feigenspan, Inc., v. Bodine*, 264 F. 186 (D.N.J. 1920), *affirmed sub nom, Rhode Island v. Palmer*, 253 U.S. 350 (1920).

In seeking to invoke the certiorari jurisdiction of this Court, however, Petitioners assert in their petition that the decision of the District Court below, as affirmed by the Eleventh Circuit, conflicts in its interpretation of the scope of the word "amend" with a prior decision of this Court. *Phillips Petroleum Company v. Jenkins*, 297 U.S. 629 (1936). Petitioners quote only from one paragraph of that opinion in an attempt to argue that this Court ruled for all time that any power to "amend" can only include the *addition* of substantive provisions to a policy or statute, and that such power can *never* authorize the *deletion* of substantive *non-vested* provisions. The District Court and the Eleventh Circuit summarily rejected this overly restrictive and novel interpretation.

An examination of *Phillips Petroleum* discloses, however, that the issue before that Court had nothing whatsoever to do with a general definition of the scope of a reserved power to "amend." *Phillips Petroleum* dealt

with a statutory scheme in the State of Arkansas which subjected foreign corporations and domestic corporations to a statutory reversal of the traditional fellow-servant doctrine in negligence actions brought by employees of certain types of corporations. An equal protection challenge was lodged against this statute, claiming that the Fourteenth Amendment equal protection and due process guarantees were violated, in that the statute applied only to corporations and not to noncorporate employers.

The language cited by Petitioners in the case at bar is extracted out of context from a discussion of the scope of the power of the Arkansas legislature to require subsequent amendments to corporate charters of corporations doing business in that state. This Court, while upholding the general application of the statute to both domestic and foreign corporations, held that power to require amendments to corporate charters could not be exercised so as to destroy *vested rights* of corporations already doing business in the state.

On this first point, *Phillips Petroleum* is clearly distinguishable from the case at bar, in that the late Judge Edenfield ruled below that as a matter of *fact and State law* Petitioners *had no vested property interests* in continued employment with the Stone Mountain Memorial Association. This ruling was based in part upon facts found by the Court from the trial of the case concerning the intent of the Respondent Association in reserving the power to amend its personnel policies and procedures, even prior to the addition of the so-called Merit System ten years after that reservation. (Petition for Certiorari, at A-18, 19). Since Judge Edenfield ruled as a matter of fact and law that the Petitioners had no vested property interest in their employment, the language quoted by Petitioners from *Phillips Petroleum* does not apply.

Phillips Petroleum is distinguishable on several other grounds as well. The Court in that case specifically stated that the "sole question" before it was whether the statutory reversal of the fellow-servant doctrine violated the equal protection provisions of the Fourteenth Amendment due to the fact that the statute in question did not apply to noncorporate employers. 297 U.S., at 633. Further, *Phillips Petroleum* dealt with a reservation of power to amend where the limitation on the statutory power to amend *specifically accompanied* the power *in the statute.* The Court noted that the statute being interpreted provided that:

> "[a]mendment may only be made whenever in the opinion of the general assembly that charter 'may be injurious to the citizens of this State' and then only 'in such manner, however, that no injustice shall be done to the corporators.' " 297 U.S., at 636.

In the case at bar, there is no such limitation included in the power reserved by the Stone Mountain Memorial Association in 1966 to subsequently amend its personnel Policies and Procedures by board resolution. That power reads in its entirety as follows, without limitation:

> "These policies and procedures may be amended by Association resolution." (Section 13.1, Policies and Procedures, Stip. 3, R-209, Petition for Certiorari, at p. A-2).

Upon review of the *Phillips Petroleum* case, therefore, it is readily apparent that in no manner do the decisions below of the Eleventh Circuit Court of Appeals and the late Judge Edenfield of the Northern District of Georgia conflict with a prior decision of this Court.

B. This case does not present an appropriate question for the exercise of the Court's certiorari power.

As previously noted, counsel for Petitioners has conceded in his brief and in argument before the Eleventh Circuit Court of Appeals that the entire case at bar rises and falls on the permissible scope of the term "amend" as applied to the facts in this case. It is further undisputed under the rulings of this Court in *Roth, supra,* and *Bishop, supra,* that such determination is peculiarly a question of State law. Judge Edenfield carefully examined State law prior to his ruling that the Respondent Association's reservation of the power to "amend" its personnel Policies and Procedures was broad enough to authorize the 1978 Association resolution. (Petition for Certiorari, at pp. A-17-19). As such, Judge Edenfield's order is simply an *application of State law to the facts.* This case is not, therefore, an appropriate one for the exercise of this Court's certiorari powers of review, in that the Court does not normally grant certiorari to review evidence and discuss specific facts. *United States v. Johnston,* 268 U.S. 220 (1925).

Respondents submit that this case is an inappropriate one for the exercise of this Court's certiorari powers for the further reason that the decision below has no national, regional, or state importance. Since the entire decision of the District Court turns on the *factual* application of the term "amend" to the personnel Policies and Procedures of one specific employer, and further is limited even with that employer's work force to employees who were hired prior to September 11, 1978, the order and decision of Judge Edenfield only *potentially* affects a mere handful of

individuals.[4] Other cases with other employers in other localities would of course turn on the particular facts and language of reservations of the power to amend in those particular cases.

As previously noted, the legal issue concerning the scope of the term "amend," as it pertains to the reservation of the power of amendment by the Respondent Association, has been thoroughly briefed both in pre-trial and post-trial briefs submitted to Judge Edenfield in the District Court, and in briefs, reply briefs, and oral argument before the Eleventh Circuit Court of Appeals. Since, as shown above, there is no conflict with prior decisions of this Court, Respondent submits that the reasoned judgments of the lower Courts should not be disturbed on certiorari, turning as they do on issues of fact and application of State law. The Eleventh Circuit Court of Appeals recognized this exercise of judicial economy in affirming the case under its Rule 25, providing for affirmance without opinion when the judgment of the District Court is based on findings of fact that are not clearly erroneous and where the Court also determines that no error of law appears and an opinion would have no precedential value. See p. v, *supra*.

Therefore, Respondent respectfully urges that this case is not an appropriate one for exercise of this Court's certiorari powers.

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[4] Even amongst the handful of potentially affected persons, only three may *actually* be affected by the outcome of this case; the two Petitioners in this case and a plaintiff in a subsequent identical case, which was filed by Petitioners' same counsel after the District Court order in the case at bar, and which has been stayed pending this Court's decision on the Petition for Certiorari in this case. *Smith v. Stone Mountain Memorial Association*, N.D.Ga., C.A. No. 81-1834A.

X. CONCLUSION

For the reasons stated above, Respondents respectfully submit that the Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, THOMAS D. WATRY, Assistant Attorney General for the State of Georgia, certify that I have served three (3) true and correct copies of the foregoing RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI upon Petitioners, through their counsel, in accordance with Rule 28.3 of this Court, by depositing same in a United States mailbox, with adequate pre-paid first-class postage affixed thereto, addressed to:

Fletcher Thompson
Attorney at Law
300 Interstate N. Parkway
Suite 329
Atlanta, Georgia 30339

This _____ day of _____, 1982.

THOMAS D. WATRY
Counsel for Respondents